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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1285

S. L. INLOW, DUDDY WALLER, JOHN P. WOOD, ED STEVENSON, RACHAEL GOFORTH, BOB PHILPOT, JIM AYLESHIRE, RAYMOND STROUD, BILL PLUNKETT, and MENA SPECIAL SCHOOL DISTRICT,

Petitioners,

vs.

PEGGY STRICKLAND, a Minor, by Mr. and Mrs. Virgil Justice, Her Parents and Next Friends; VIRGINIA CRAIN, a Minor, by Doris Crain, Her Mother and Next Friend,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to those cited by Petitioners there are the following:

Constitution, State of Arkansas, Article 14: As amended by Amendment Number 53 adopted in 1968:

NO. 53. ARTICLE 14, § 1 AMENDED

§ 1. *Free School System.* Intelligence and virtue being the safeguards of liberty and the bulwark of a free and good government, the State shall ever maintain a general, suitable and efficient system of free public schools and shall adopt all suitable means to secure to the people the advantages and opportunities of education. The specific intention of this amendment is to authorize that in addition to existing constitutional or statutory provisions the General Assembly and/or public school districts may spend public funds for the education of persons over twenty-one (21) years of age and under six (6) years of age, as may be provided by law, and no other interpretation shall be given to it.

Act No. 169, Acts of Arkansas for 1931, Section 165, page 146, compiled as Section 80-1501, Arkansas Statutes (1947) Annotated (1960 Replacement Volume 7, page 216):

§ 80-1501. *Age of students permitted to attend schools.*—The public schools of any school district shall be open and free to all persons between the ages of six (6) and twenty-one (21) years, residing in that district, and the directors of any district may permit older or younger persons to attend the schools under such regulations as the State Board of Education may prescribe.

Section 150 of Act No. 169 of 1931, cited above:

§ 80-1502. *Attendance, required of children aged seven to fifteen.*—Every parent, guardian, or other person residing within the State of Arkansas and having in custody or charge any child or children between the ages of seven (7) and fifteen (15), (both inclusive)

shall send such child or children to a public, private, or parochial school under such penalty for non-compliance with this section as hereinafter provided.

28 U.S.C. 1343 (3) and (4):

§ 1343. *Civil rights and elective franchise.*

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

28 U.S.C. 2201 and 2202:

§ 2201. *Creation of remedy.*

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

§ 2202. *Further relief.*

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

42 U.S.C. 1981 and 1983:

§ 1981. *Equal rights under the law.*

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

§ 1983. *Civil action for deprivation of rights.*

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

QUESTIONS PRESENTED

1. Is a child attending a public school in Arkansas constitutionally entitled to some form of due process of law before being expelled from school for the balance of the semester?

2. If such child does have such rights of due process and equal protection, what are a child's remedies when denied those constitutional rights?

STATEMENT OF FACTS PERTINENT TO THE APPEAL

At the time the events transpired which gave rise to this litigation, the two Plaintiffs, Peggy Strickland and Virginia Crain, each was 16 years of age and were white, female students regularly enrolled and attending the 10th grade in the public schools of Mena, Polk County, Arkansas. Neither had ever required disciplining before, both were doing well in school and both held offices in the student organization of their Home Economics Class referred to as Future Homemakers of America (FHA). Virginia Crain was Secretary and Peggy was song leader and historian (A. 15 and 39).

On or about February 7, 1972 (A. 16), the FHA had planned a Mother-Daughter Panel Discussion for its program at its regular weekly meeting of mothers and daughters. Refreshments were traditionally served by the group at these meetings. Members of the group routinely alternated in preparation of the refreshments. It was the turn of Sandy Thomas (A. 16) to provide the punch for the February 7 meeting and Sandy forgot about doing it. This development was discovered during first period and

a group of the girls, made up of Sandy Thomas, Ginny Brown, Jo Wahl, Virginia Crain, Peggy Strickland, Patty Rackley and Debbie Philpot (A. 16 and 17) discussed the problem and the idea came up to spike the punch for the meeting. It caught on and all of the girls were for doing it. No one of them objected (A. 17).

There was the problem of what to get, where to get it and how to get it. By the time the third period arrived, these problems had been worked out and three of the girls, Jo Wahl, Virginia Crain and Peggy Strickland, obtained permission from the appropriate teacher, as well as money for purchasing supplies for the punch, left the campus in the automobile of Jo Wahl, drove to Cove, Arkansas, some 15 miles South of Mena, then West about 3 miles into the State of Oklahoma and there, at the drive-in window of a beer tavern, they purchased two 12 ounce bottles of a flavored malt liquor called Right Time, which is bottled especially for Oklahoma by Theodore Hamm Company, St. Paul, Minnesota (A. 93), and which contains 3.2% alcohol by weight (A. 94). Neither Virginia Crain nor Peggy Strickland had any idea what to buy for the purpose of spiking the punch. Jo Wahl is the girl who decided what to get and took care of the purchase (A. 18 and 19).

The girls then poured the two bottles of Right Time into a milk carton which they had taken along for that purpose (A. 19).

The girls then took the milk carton to Piggly Wiggly in Mena and purchased six bottles of King Cooler, a soft drink, 10 fluid ounce bottles, and poured those into the milk carton before going back to school (A. 19). At this point the girls had 84 ounces of liquid in the milk carton. They then returned to school and added enough water to make up 1½ gallons of punch, which was then put in the ice box (A. 19). By mathematical computation there were .768

ounces of alcohol in the mixture. If it were possible for one person's stomach to contain the entire 84 ounces at one time, it still would not have been enough alcohol to intoxicate him.

When the time came to serve the punch, Jo Wahl and Peggy Strickland brought it down from the Home-Ec room to the meeting room. Peggy Strickland was carrying the gallon jug and Jo Wahl was carrying the punch bowl. When the girls arrived at the meeting place with the punch, other girls in the class, knowing of the plan to spike the punch, wanted to taste it and commenced tasting it and commenced an excited exchange (A. 20) over the fact that the presence of the spiking agent could be detected. Peggy Strickland and Virginia Crain became alarmed and attempted to pour the punch out. Peggy ran outside with the jug intending to pour it out but before she could do so, other girls in the class, chased her screaming, "Don't throw that out, Peggy, don't pitch that out" (A. 21) and one of the girls, Cindy Thomson (A. 21), grabbed the jug away from Peggy (A. 22), and took it back into the meeting room. Peggy and Virginia would not thereafter go into the meeting and instead hid out between a dividing wall and had nothing more to do with the punch (A. 42 and 43).

No one at the meeting had any objection to the punch and no one had any reaction from it (A. 22).

Nothing further was heard about the incident until about 10 days later (A. 23) when the Home-Ec teacher, Mrs. Gladys Powell, commenced questioning some of the girls about the incident. When she inquired of Virginia and Peggy, together, they first denied any knowledge of it; however, when Mrs. Powell told them that if they would tell her the truth that she would handle the punishment herself, they told her the full story, including their participation in it (A. 23). This was on February 17, 1972. The

next day, however, Mrs. Powell called the girls back to her and told them that she did not wish to break her word but that the talk about the incident was "getting real loud around the school and that Mr. Waller (the principal) would probably find out anyway and her job would be on the line and she would just tell him to give us what we deserved" (A. 38), if the girls did not go themselves and tell Mr. Waller.

Under those terms, the girls had little choice but to go and throw themselves on the mercy of Mr. Waller, which they then did. The visit with Mr. Waller occurred during first period and he told them at that time that it would have to go before the Board (A. 24). Mr. Waller did not know anything about the product which the girls described to him (A. 59). Only one of them, Jo Wahl, purported to know anything about what it was and she said, erroneously, that it was 20% alcohol (A. 52).

Later in the day, Mr. Waller called the girls back to his office and told them that they would be expelled for one week and all extracurricular activities cut out and that they would be on probation for the rest of the year, that there would be a Board Meeting that night (A. 24 and 25) and that "you go home and tell your parents if you want to but, please, girls, don't let them get in contact with any of the Board Members . . ." (A. 25).

Peggy Strickland told her parents and her daddy intended to call Mr. Waller but Peggy admonished him that Mr. Waller had said that the parents should not contact any of the Board Members (A. 26). Virginia Crain, likewise, told her mother about Mr. Waller admonishing them that they should not contact any of the Board Members (A. 45). Accordingly, the parents did not contact any of the Board Members and did not attend the meeting. No notice of the meeting was given to the parents and no invitation was given to them to attend (A. 62).

The Superintendent is the Secretary for the Board and routinely gives notice to the Board Members and public news media of special Board Meetings. The telephone numbers of the parents were equally available to Mr. Inlow, the Superintendent, as were the telephone numbers of the Board Members (A. 62). It would have been no trouble at all to call the parents (A. 62).

A basketball game was scheduled for high school that evening and the School Board Meeting was called to follow the basketball game. It commenced at 9:30 o'clock P.M. (A. 105). Members present were Ed Stevenson, Raymond Stroud, Rachael Goforth, Jim Ayleshire, Bob Philpot, Bill Plunkett, Superintendent S. L. Inlow, high school principal P. T. Waller and Home Economics teacher Gladys Powell. One member of the public was present, a Mr. Jim Barton (A. 105). The main order of business was the disciplining of the three girls (A. 62).

At the beginning of the meeting the Defendant, S. L. Inlow, introduced Mrs. Curtis Powell, the Home-Ec teacher, and the Defendant, Duddy Waller, and told the Board that these two teachers were familiar with the details and would furnish the information to the Board (A. 63). No other witness was present (A. 63). No other person attempted to furnish any information to the Board. Mrs. Curtis Powell had witnessed nothing herself and merely related to the Board that the girls told her they had put an alcoholic beverage in the punch (A. 53).

The only other witness was the Defendant, Duddy Waller, and he again merely repeated to the Board what the girls had told him. Neither he nor Mrs. Powell had made any independent investigation to determine what the facts were. Neither was familiar with the particular type of so-called "alcoholic beverage" named (A. 52, 53, 63) to them by the girls. Likewise, the Board made no investiga-

tion of its own as to what type of so-called "alcoholic beverage" had been acquired by the three girls nor as to how much of it they had allegedly placed in the punch (A. 54, 63, 73, 75, 76 and 77).

After making their report to the Board of the information given them by the children both teachers, Mrs. Curtis Powell and the Defendant, Duddy Waller, recommended to the Board that the Board show any leniency which it felt it could toward the girls (A. 63, 106). At this stage of the proceeding, a telephone call came into the Board Meeting room and the call was answered by the Defendant Inlow. The call was from another teacher (A. 64) of Mena High School, Mr. Curtis Powell, a science teacher, and husband of Mrs. Gladys Powell, the Home-Ec teacher who was appearing as a witness before the Board, and Mr. Curtis Powell reported in his telephone call to Mr. Inlow that some person had reported to him, Mr. Powell (A. 64), that Jo Wahl (A. 65), one of the three girls then under consideration, had been involved in an altercation earlier that evening, following the basketball game and prior to the Board Meeting, and apparently while the crowd was leaving the basketball game at the gymnasium, with one of the children who had informed on the Plaintiffs and Jo Wahl. No mention was made by Mr. Curtis Powell of either Peggy Strickland or Virginia Crain.

Mr. Curtis Powell had not witnessed such altercation himself but merely had been told about it by someone else. Mr. Curtis Powell knew that the Board was having its meeting then for that purpose because he knew his wife was one of the teachers appearing before the Board as a witness against the three girls.

After receiving this information from Mr. Curtis Powell, and knowing that only Jo Wahl was the one reported by hearsay upon hearsay to have participated in an

altercation that evening, the Defendant, S. L. Inlow, nevertheless withheld that name in reporting to the Board (A. 65, 74). The report of S. L. Inlow to the Board was that the call was from a teacher reporting that one of the three girls under consideration had been involved in an altercation outside the gymnasium that evening. S. L. Inlow did not give the name of which girl it was, even though he had been told by Curtis Powell (A. 65).

Mrs. Curtis Powell, without asking which one of the girls was reported to have been involved, withdrew her recommendation as to all three girls, "washing her hands of the whole affair" (A. 65).

The Defendant, Duddy Waller, without asking which one of the three girls was reported to have been involved likewise withdrew his recommendation for leniency (A. 65).

The School Board, without asking which one of the three girls was reported to have been involved, expelled all three of the girls for the rest of the semester (A. 74).

The Defendant Inlow, knowing that only Jo Wahl was reported by hearsay upon hearsay to have been involved in the altercation, sat there and witnessed the turnabout of the two teachers and the action of the Board in expelling all three girls and never gave them the name of the one girl involved in the hearsay report, or even that Mr. Curtis Powell had given him the name of which one (A. 66).

The Board never apparently took any vote on the question. The Minutes of the Meeting (A. 105, 196) reflect the attitude of the Board that their rule was automatic, that it required no affirmative action by the Board and that without any such affirmative action the children were automatically suspended for the balance of the term. The attitude of the Board was that the only occasion for affirmative action would be in order to "grant leniency". The para-

graph of the Minutes (A. 106) which reflects the "action" of the Board on this question reads:

> "Mr. Stevenson asked the Board Members if anyone cared to make a Motion to grant leniency in the case or to change the application of the policy. There being no such motion, he ruled that the policy had been upheld and that the three girls: Joe Wahl, Peggy Strickland and Virginia Crain, be suspended from school for the remainder of the semester as required by Board policy."

The following morning, a Saturday, Mr. Waller called the residence of Peggy Strickland on the phone but did not mention the problem to her father and instead asked for Peggy, and told Peggy that he would like her to come to Mr. Inlow's office at 9:15 o'clock that morning and that she could bring her parents if she wanted to (A. 27). He likewise called Virginia, got her and asked her to come to Mr. Inlow's office, asked her "something about bringing my mother". The children and their parents met with Mr. Inlow, Mr. Waller, and Mrs. Powell (A. 28, 46). ". . . they just told us what the Board had decided and that we were expelled for the rest of the semester." (A. 28). Peggy's father asked if they could hold a special Board Meeting for reconsideration and Mr. Inlow stated "you can bring it up again at the next Board Meeting" (A. 28). There followed efforts by the parents and friends to get the children reinstated (A. 75, 77) which were unsuccessful. A special meeting was denied until the Plaintiffs employed an attorney (A. 137 and 138) at which time a special meeting was scheduled for March 2, 1972, at 7:30 o'clock P.M.

The Minutes of the Meeting of March 2, 1972, were kept by the Defendant, S. L. Inlow (A. 67). Prior to the meeting an effort was made to have Peggy Strickland's

homeroom teacher present, Mrs. Gazell (A. 66). She was contacted by Plaintiffs' Attorney and requested to attend. Thereafter, she talked with the Defendant, S. L. Inlow, and he advised her that she did not have to attend (A. 67). She did not attend.

At the commencement of the meeting the Board's Attorney, Mr. Joe Hardegree, presented a document referred to as "Facts Found By School Board". It is shown at Appendix 137 as Plaintiffs' Exhibit 14.

Nothing further was done or said by the Board at the March 2, 1972, meeting other than the presentation of this statement. Neither of the two teachers who were the only "witnesses" at the February 18 meeting were present, although they were both in the building (A. 60, 67). This fact was known to the board (A. 67) but was unknown to the Plaintiffs or their Attorney (A. 60). No witness whatever appeared before the Board (A. 37). The Petitioners have never been present at any time when anyone was purporting to tell the Board anything about what the Plaintiffs had done or what the Plaintiffs had told any of their teachers or supervisors about what they had done (A. 37, 38). Both of the Plaintiffs were suspended before they ever appeared before the Board (A. 38).

The Minutes demonstrate that no one spoke at the Meeting of March 2 except Mr. Stevenson, Mr. Hardegree, Mr. Core, Peggy Strickland, Virginia Crain, Mr. Ayleshire in making a motion and Dr. Wood in seconding the motion. See also Appendix page 9. The girls were faced with the stone-faced silence of a group of officials who had their minds set and whose reason was invulnerable to any approach.

Suit was filed four days later.

REPLY TO STATEMENT OF PETITIONERS

The statement of the Petitioners begins on page four of their brief.

In the first paragraph of that statement the Board brief states that the suspension of the Plaintiffs was "because of a school board finding that the students had violated a rule prohibiting possession or use of intoxicating beverages at school or at a school sponsored activity".

This statement is misleading.

The expulsion of the girls occurred as a result of a late evening meeting on February 18, 1972, held after a basketball game, without notice to any of the parents and without any of the parents or plaintiffs being present. See appendix page 105, stating that the meeting commenced at 9:30 o'clock P.M. The minutes of the meeting do not indicate that any finding whatever was made by the Board other than that the rule was automatic unless there was action by the Board "to change the application of the policy" (Appendix page 106). "There being no such motion, he (the president of the board) ruled that the policy had been upheld and that the three girls: Jo Wahl, Peggy Strickland and Virginia Crain, be suspended from school for the remainder of the semester *as required by Board policy* (Emphasis supplied)."

Apparently there was no motion to expel or otherwise. There was merely tacit agreement by all members of the Board that expulsion was automatic upon the receipt of a hearsay report from two teachers that the children had put "an alcoholic beverage into punch served to a group of FHA girls and some of their mothers".

This is a far cry from hearing evidence, permitting interested parties to speak and present information, listening to the children involved, investigating the seriousness and impact of the alleged offense, and making a "school board finding that the students had violated a rule."

The meeting was by no means a deliberative, fact-finding procedure.

On page 5 the Board brief states that "the three girls had admitted. . ." To use the term "admitted" gives a bad connotation to the information given to Mrs. Powell by the girls.

What actually happened was that Mrs. Powell promised the girls that if they would tell her what they had to do with "spiking the punch" that she, Mrs. Powell, "will try to punish you myself and handle it" (Appendix 23). On that promise the girls told her of the part which they had played in the prank. The next day Mrs. Powell had changed her mind. She called the girls back and "she did not want to break her word and say—you know, be a traitor and go back on us but that if it does get to Mr. Waller without us telling him that she is just going to say 'Slap it to them,' give them what they deserve." Thus we find Mrs. Powell on one day getting a confession out of the girls by assuring them that she will take care of it and that they will not be punished by anyone else. The next day we find Mrs. Powell threatening to turn against them if they do not go and tell Mr. Waller. This was an adult dealing with children.

Further on in the same statement, on page 5 of the brief, the Board says:

> ". . . they left the school grounds, traveled into the State of Oklahoma and there purchased at a tavern *several bottles* of a malt liquor beverage. . . (Emphasis supplied)"

The implication is that the girls purchased a large quantity of malt liquor (Appendix 48 is cited). Nowhere on Appendix 48 is any quantity of bottles mentioned. The girls have always said that they purchased two bottles. There has never been any suggestion from any source that they purchased any more that that (Appendix 19). Each bottle contained 12 ounces (Appendix 49). Therefore, altogether the girls purchased 24 ounces of the malt liquor. They did not purchase "several bottles".

Later on in the statement the Board mentions that "Mrs. Powell learned of the girls' action and upon confronting them with her information, the girls confessed their involvement". We have already discussed the circumstances of Mrs. Powell getting the information from the girls under a promise that she would handle the punishment and that it would go no higher. Far from being a "confrontation" this should be characterized as an illegal confession obtained by promise of benefit. The Board then says that "Mrs. Powell . . . later decided that the matter should be brought to the attention of . . . the principal." (Brief page 5). The Board brief should have made it clear that Mrs. Powell became scared that she would lose her job if she kept her word to the girls and that this personal fear caused her to intimidate the girls to go involuntarily to Mr. Waller (Appendix 38).

> "Q. Then why were you all influenced to go down and see Mr. Waller?
>
> A. Because she told us word was getting around and was getting real loud around the school and that Mr. Waller would probably find out anyway and her job would be on the line and she would just tell him to give us what we deserved."

Next, the Board brief says:

> "As it turned out, the Board met in special session that evening to consider the matter." (Brief page 5).

This makes it appear that the Board just casually met and that it just happened to work out that way. The evidence gives a different picture. The girls testified that when Mr. Waller suspended them he told them that he would call a Board meeting that night but that if the girls told their parents they should also tell the parents that the parents should not get in contact with any of the Board members (Appendix 25 and 45). There was no suggestion that either the girls or their parents could attend the meeting (Appendix 26 and 45). The implication was clear that the children and their parents were to stay away and not even contact the Board members until after the meeting was over (Appendix 26 and 45).

On page six of the brief the Board states:

> "The next day, February 19, 1972, the School Administrators met with the students and their parents to advise them of the action taken."

As a matter of fact, Mr. Waller called the residence of Peggy Strickland, got her father and asked to speak to Peggy and told Peggy to come to Mr. Inlow's office at 9:15 "and you can bring your parents if you would like to" (Appendix 27). When Mr. Waller called Virginia Crain's home he got Virginia and talked with her (Appendix 46). The Board makes no mention of the testimony that the people at the meeting, Mr. Waller, Mr. Inlow and Mrs. Powell, representing the school, maintained that the School Board policy was automatic and that there was no need to call the School Board back into session for any additional meeting (Appendix 28).

Following the foregoing quoted statement the Board brief then says:

> "Also, on February 24, 1974, the superintendent wrote to the parents advising of their right to petition the Board for reinstatement (A. 137-38, etc.)."

Not mentioned are the many attempts by the parents to get a special setting of the Board without success (Appendix 76, 77) and February 24, 1972, is the date on which the plaintiffs finally despaired and hired an attorney. The Board then decided that a special meeting could be held and called it at the request of the plaintiffs' attorney (Appendix 66, 106, 138).

The implication of the statements in the Board brief is that the Board was routinely and voluntarily providing a forum for the plaintiffs and their parents to be heard. The opposite is true.

On page 7 the statement deals with the meeting of March 2, 1972. It is not mentioned that there were no witnesses whatever presented by the Board at that meeting (Appendix 9, 37, 38, 46, 47). Although Mr. Waller and Mrs. Powell were in the building during the meeting, appendix 60 and 67, and although this was known to the Board and unknown to the attorney for the children, appendix 60, they were not called into the meeting room. Further, the homeroom teacher of Peggy, a Mrs. Gazell, had been requested to be present by the attorney for the children and after a conversation which she had with her superintendent, Mr. Inlow, and his advising her that she did not have to attend, she likewise was not present (Appendix 67).

The Board then says, on page 7:

> "The Board did make provisions so that, by a special course of instruction consisting of correspondence courses and increased course loads, the girls could graduate with their class." (Brief page 7).

Appendix 36 is cited. There is no such statement on that page. Peggy Strickland answered yes to a question as to whether or not she had been "told or shown" that she could finish with her class by taking correspondence courses. Appendix page 47 is cited and there Virginia Crain answered yes to whether or not the school counselor had "pointed out to you the way in which you can go ahead and complete school with your class." There is no testimony that the Board "did make provisions" for anything. There is no testimony that the high school gives any sort of correspondence courses or special courses of instruction or increased course loads. All credit for assuming and carrying a heavier burden goes to these children and certainly not to the Board which wrongfully created the necessity for the additional burden. For the Board to claim this credit which is rightfully due these girls, to the discredit of the Board, adds insult to injury.

The remainder of the statement is fair.

SUMMARY OF ARGUMENT

The respondents contend that a child attending a public school in the State of Arkansas is entitled to some form of due process of law before being expelled from school for the balance of the semester. It is not contended that such "due process" should be anything like as strict as is required for criminal cases where the punishment may involve deprivation of life, liberty or property. However,

expulsion from school, when accompanied, as in this case, with the making of a record of the fact of such expulsion and the maintenance of such record, and the reason stated for such expulsion on such record, portend such grave consequences for the affected child that reasonable notice to the child and his parents or guardian, with an opportunity to hear the proof adduced against him and an opportunity to rebut the same, and to prepare in advance for making such rebuttal, are absolute essentials before the infliction of such punishment. Such due process rudiments are to be afforded prior to the expulsion.

The District Court did not refuse jurisdiction in this case and neither did the Court of Appeals. A general order adopted by the United States District Court for the Western District of Missouri, for application in cases involving tax supported institutions for higher education, demonstrate very lucidly the legal authorities involved and the nature of the legal remedies. 45 F.R.D. 133.

Numerous cases decided in the Federal District Courts and Court of Appeal have treated in explicit detail the principles involved and virtually all of them acknowledge that cases of expulsion from the public schools fall within constitutional protections of due process and equal protection.

The recovery of damages in actions under 42 U.S.C., Section 1983 are specifically authorized against public officials acting in their official capacity and also in their individual capacity. The doctrine of official immunity is not available to the public official unless he has acted in good faith, objectively determined.

The Board has not contested the allowance of attorney's fees and additional attorney's fees should be assessed in this Court. *McBeth* v. *The Board of Education*, 300 F.Supp. 1270 (E.D. Ark. 1969).

ARGUMENT

Issues

The issue or issues in this litigation amount to a one plus one question. If the first question is answered in the negative, then it is the only question. If the first question is answered in the affirmative, then there is a second question. The first question is:

> IS A CHILD ATTENDING A PUBLIC SCHOOL IN ARKANSAS CONSTITUTIONALLY ENTITLED TO SOME FORM OF DUE PROCESS OF LAW BEFORE BEING EXPELLED FROM SCHOOL FOR THE BALANCE OF THE SEMESTER?

If indeed such child has no constitutional rights to due process and equal protection, then that ends the case and there is no second question. If such child does have such rights of due process and equal protection, then the next question is:

> WHAT ARE A CHILD'S REMEDIES WHEN DENIED THOSE CONSTITUTIONAL RIGHTS?

The School Board, in its Brief at page 14, commences its argument with an assertion that the Federal Courts do not even have jurisdiction to hear a case of this type.

The United States District Court for the Western District of Arkansas did not deny relief for lack of jurisdiction.

Early in the proceeding, the United States District Court recognized that the threshold issue was the validity of the rule itself. The Judge decided that issue at the first hearing, March 7, 1972, when he said:

> I don't find there is a thing unconstitutional in this manual. I think that it is completely constitutional (A. 81).

However, the District Judge then recognized that the second issue was also a constitutional one when he went on to say:

> If there is anything unconstitutional, it is the manner in which the Board has enforced it in this case (A. 81).

Earlier Judge Williams had said (A. 80):

> The Supreme Court of the United States has held over and over that the depriving of any student of school days can indeed cause very serious harm.

The learned Judge went on to say:

> It is not a part of the Court Order but I encourage the School Board to meet immediately and see if this matter can be resolved in a practical way. It would be a grave injustice if this were not an intoxicating (beverage) to keep two girls out because the School Board has made a mistake about it. . . . (A. 83, 84).

Even though the District Court denied the temporary injunction, the Court went on and entertained jurisdiction and ultimately held a trial which was to serve as a trial on the merits. However, at that trial, in the instructions, the District Court treated the case solely as one for damages and held that since the proof did not establish malice on the part of any Defendant that the Plaintiffs could have no relief of any kind, either for injunction, declaratory judgment, attorney fees, or damages, either compensatory or punitive (A. 34, Petition for Writ of Certiorari).

The Eighth Circuit Court of Appeals, in its review, held that there was jurisdiction in the Federal Courts in this case.

In 45 F.R.D. 133, the United States District Court for the Western District of Missouri adopted a general order on "judicial standards of procedure and substance in review of Student discipline in tax supported institutions of higher education". At 45 F.R.D. 133 the order dealt with jurisdiction as follows:

Jurisdiction

1. Under Sections 1343(3), Title 28, and 1983, Title 42, U.S.C., and also in appropriate cases under Sections 2201, 1331(a) or 1332(a), Title 28, U.S.C., the United States District Courts have jurisdiction to entertain and determine actions by students who claim unreasonably discriminatory, arbitrary or capricious actions lacking in due process and depriving a student of admission to or continued attendance at tax supported institutions of higher education.

The order went on to deal with the nature of the action to be brought as follows:

Nature of Action

2. The action may be
   (a) Under Section 1983, an action at law for damages triable by a jury;
   (b) Under Section 1983, a suit in equity; or
   (c) Under Section 1983 and Section 2201, a declaratory judgment action, which may be legal or equitable in nature depending on the issues herein.

It is true that the foregoing order dealt with colleges and universities which were tax supported. However, the

Court made a point of the fact that attendance at such tax supported institutions was not compulsory but was optional and voluntary. If there are constitutional rights against discriminatory, arbitrary or capricious actions lacking in due process by the administrators of those schools which can be attended voluntarily, then by force of greater reasoning there should be the same rights in those tax supported schools at which attendance is required. Nevertheless, as the Missouri Federal Court said, 45 F.R.D. 144:

> It is unimportant whether this protected opportunity is defined as a right or a privilege. The protection of the opportunity is the important thing.

Decisions of Federal Courts taking jurisdiction and exercising jurisdiction in cases of this type are legion. To cite only a few:

Dunn v. *Tyler Independent School District*, 327 F.Supp. 528 (U.S.D.C., E.D. Texas, Tyler Division, May 27, 1971);

Pervis v. *LaMarque Independent School District*, 328 F.Supp. 638 (U.S.D.C., S.D. Texas, Galveston Division, June 4, 1971);

Caldwell v. *Cannady*, 340 F.Supp. 835 (U.S.D.C., N.D. Texas, Lubbock Division, March 9, 1972);

Vought v. *Van Buren Public Schools*, 306 F.Supp. 1388 (U.S.D.C., E.D. Michigan, S.D., May 8, 1969);

Williams v. *Dade County School Board*, 441 F.2d 299 (5th Cir. 1971).

The tack taken by the Board in its Brief is that "a student's interest in continued participation in the education program conducted by a Public School District is not an interest protected by the Constitution of the United States."

Thereafter, the Board continues for fifteen pages of its Brief with an argument, the net effect of which is that a State can deny the benefit of enrollment in its public schools to these Plaintiffs and they have no recourse to the Federal Courts under the Federal Constitution. Although the Board cites many cases it comes back always to the decision of this Court in *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973). That, of course, is the decision of the Court in the case which sought to have declared invalid under the Federal Constitution the statutory system of the State of Texas for financing public education by an ad valorem tax by each school district on property within the district to supplement educational funds received by each district from the State.

There was discussion in the majority opinion as to whether or not education is a "fundamental personal right or liberty" 411 U.S. 38, and the conclusion of the majority opinion was in effect that it was not so much so as to require invalidation of the financing system created by the State of Texas for the very purpose of providing such education to its citizens, and doing so by "strict judicial scrutiny". However, the realistic basis for the distinction of the case from other cases dealing with educational questions is made clear at 411 U.S. 38 as follows:

> A critical distinction between those cases and the one now before us lies in what Texas is endeavoring to do with respect to education. Ibid. 38.

> Every step leading to the establishment of the system Texas utilizes today—including the decisions permitting localities to tax and expend locally, and creating and continuously expanding state aid—was implemented in an effort to *extend* (emphasis in original) public education and to improve its quality. Of course,

> every reform that benefits some more than others may be criticized for what it fails to accomplish. But we think it plain that, in substance, the thrust of the Texas system is affirmative and reformatory and, therefore, should be scrutinized under judicial principles sensitive to the nature of the State's efforts and to the rights reserved to the States under the Constitution. Ibid. 39.

The School Board is reasoning from a case which called into question a system of public financing of educational facilities affirmatively created and extended to the citizens of Texas for their benefit. The entire program was positive and affirmative. It was created, designed, supported, and prosecuted for the purpose of making it available to the citizens. Nothing was being first extended and then withdrawn. No one was deprived of anything. The argument was that the system extended more to some than it did to others. There was no contention that it deliberately withdrew anything from anyone. The School Board offers the decision in that case as authority controlling this one. This is a case in which a School Board deliberately, intentionally, and effectively withdrew the educational facilities of the State of Arkansas from these two children. There is nothing in the Texas case which shields the School Board from Federal Jurisdiction in reviewing their actions in doing this. In the face of the multitude of Federal Court decisions taking jurisdiction in cases of this type, it appears that there can no longer be any serious question about Federal jurisdiction. It is obvious, of course, that not every collateral question involving schools and their administration will give rise to a Federal question. The School Board cites some of those decisions as authority for its position in this case. Further it is not contended that the School officials have no au-

thority at all to suspend or expel a student. It is merely contended that in doing so the School Board must treat the child as a human being and a citizen and must not deprive him of the opportunity to attend school without obedience to certain minimum due process requirements.

The following are some examples of those holdings. One such case is *Williams* v. *Dade County School Board*, 441 F.2d 299 (5th Cir. 1971).

There, the Court was concerned with a suspension of ten days followed by an additional suspension of thirty days, a cumulative forty days suspension. The Court said:

> It is more than a mere administrative device utilized to remove unruly students at a particularly tense time. Indeed, it is tantamount to the loss of a full term.

At another place the Court said (page 301):

> Nor are we concerned with the guilt or innocence of appellant. We focus only on the school's procedure for the disposition of the case. Further, we note that though the record indicates there may have been considerable disruption in the school at the time appellant was first suspended (for ten days) we are concerned with the imposition of the additional thirty day suspension which was given without benefit of an effective hearing and at a later time.

Pertinent to the type of minimum due process requirements which would be appropriate in school expulsion cases the Court said, beginning at the bottom of page 301:

> We realize, of course, that it is not necessary that students be given the kinds of procedural protections reserved for those accused of serious crime. Nevertheless, we feel that a penalty of this magnitude (expulsion of 40 days) ought not to be imposed without

proper notice of the charges, and at least an attempt to ascertain accurately the facts involved and to give the student an opportunity to present his side of the case.

Certainly, at least that much should be given to a student and his parents.

In this particular case, no effort whatever was made by Duddy Waller, S. L. Inlow, Mrs. Curtis Powell or any member of the Board, to check on the information of the three scared little 16 year old girls. Instead, all of these adults treated these three little girls as though they were alcoholic experts and proceeded to destroy one educational year on that basis.

No one inquired as to whether the children knew what they were talking about. No one asked to see a bottle of the drink which the girls said they had put into the punch. No one purported to know what it was, what it contained, whether it was intoxicating or not. No one inquired as to how much of it had been put into the punch, nor how much punch there was, nor what the alcoholic content, if any, was. In short, no one made any sort of investigation and practically no inquiry.

If any notice had been given to the parents, and if the parents had been permitted to attend, one can certainly be satisfied that all of these questions would have been gone into, that a sample of the alleged alcoholic beverage would have been acquired and investigated and it would have been determined whether the children actually had violated any rule or not.

As it was said by the United States Supreme Court in *Brown* v. *Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 690, 98 L.Ed. 873 (1954):

In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

Another case in which the Court of Appeals of the Fifth Circuit required some due process safeguards involving college students is *Dixon* v. *Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961). The Court relied upon that decision in applying these safeguards to high school students in *Williams* v. *Dade County School Board*, 441 F.2d 299 (5th Cir. 1971).

The United States District Court for the Southern District of Florida relied upon the *Williams* case in *Tillman* v. *Dade County School Board*, 327 F.Supp. 930 (S.D. Fla. 1971). There the District Court held that the high school students had not been given due process and spelled out more clearly what such due process would require. Pertinent language of the Court appears at the following pages:

Page 933: With respect to the remaining issues, recent cases, interpreting old but good law, seem to have settled what was once subject to debate. In *Banks* v. *Board of Public Instruction of Dade County*, S.D. Fla. 1970, 314 F.Supp. 285, the court recognized the requirements set forth in *Dixon* v. *Alabama State Board of Education*, 5 Cir. 1961, 294 F.2d 150, and adopted that decision insofar as it required a notice of hearing. The hearing must include the rudimentary adversary elements: that a student subject to suspension for misconduct be given specific notice of the charges, the names of witnesses with a summary of their testimony, and the opportunity to refute the charges by oral or written testimony. The *Banks* court held, however, that the hearing need not be held prior to the suspension. Recently, in *Williams* v. *Dade County School*

Board, 5 Cir., April 5, 1971, 441 F.2d 299, this circuit noted that Banks sustained the constitutionality of that section of the School Board Policy-Regulation #5114 which allowed a ten day suspension by the principal without the benefit of a prior hearing, *but distinguished it from a 30 day suspension where such summary action could not be justified.* The court concluded that Williams should have been given a hearing which included the rudimentary adversary elements *prior* to the imposition of the additional 30 day suspension (Emphasis supplied).

* * *

Nevertheless, the parties have cured the silence of the record on these points by stipulation (1) that no information was furnished to the students named as Plaintiffs here or their parents as to the identity of witnesses whose testimony was the basis for such suspensions, and (2) that while the parents of each student who was suspended had the opportunity to confer with Principal Crabtree that opportunity was not afforded until after the imposition of the suspensions. *Williams* makes it quite clear that those students who were suspended for the additional 30 day period were entitled to a hearing prior to their being suspended. The severity of the 30 day suspension compels this requirement and more likely than not, as was the case in *Williams*, the need for suspensions without a hearing lessened in the days following the disturbances. (page 934) *Dixon, Banks* and *Williams* establish that all students who were suspended were entitled to be given the names of witnesses upon whose testimony the suspensions were based and a summary of what that testimony would be.

Another case substantially the same, on due process as the present case is that of *Vought* v. *Van Buren Public Schools*, 306 F.Supp. 1388 (E.D. Mich. S.D. 1969).

Pertinent language of the Court in that case appears at page 1393 as follows:

> It goes without saying, and needs no elaboration, that a record of expulsion from high school constitutes a lifetime stigma. It would seem that in taking an action of such drastic nature the Board of Education would have been interested in providing plaintiff with the opportunity to offer his explanation of the circumstances prior to the actual expulsion action by the Board. * * * Plaintiff claims he was entitled to a hearing. Defendants say he got one. Defendants refer to the board meeting when plaintiff appeared with his parents and his attorney. This was subsequent to the expulsion. Plaintiff had been presented with a *fait accompli* at this point.
>
> (3, 4) Our reading of the current bevy of reported cases has convinced us that plaintiff here was not treated fairly. The lack of fair treatment is such as to, in our opinion, constitute denial of due process to this plaintiff in these circumstances. He was entitled to the observance of procedural safeguards commensurate with the severity of the discipline of expulsion.

The trial judge was in error on March 7, 1972, in denying to these plaintiffs an injunction against their expulsion. Such injunction should have been granted and the school board should have been ordered to go back through the entire process in a constitutional manner in the same way that it was done in *Vought* v. *Van Buren Public Schools, supra.* If this had been done, then the plaintiffs would have been able to prove to the school board that they did

not violate the rule in question and that the expulsion was unfair and erroneous.

The complaint challenges the school board rule as being invalid on its face. This is in the paragraph numbered 10 and in the paragraph numbered 12.

The complaint contains its own argument. The rule is, by its language, mandatory. Punishment for either use or possession, regardless of degree or mitigating circumstances, "shall be" expulsion for the rest of the semester, whether that be one day or all of the semester except one day. This is unreasonable and arbitrary. It cannot stand. See *Calibillo* v. *San Jacinto Junior College*, 305 F.Supp. 857 (S.D. Texas 1969).

It seems that the rule is universally accepted in the Federal Courts that when a school board rule is challenged as depriving one of a basic constitutional right or liberty the burden of justifying such a rule limiting or terminating that right is one for the school authorities. *Richards* v. *Thurston*, 424 F.2d 1281 (1st Cir. 1970); *Ordway* v. *Hargraves*, 323 F.Supp. 1155, 1158 (D. Mass. 1971); *Breen* v. *Kahl*, 419 F.2d 1034 (7th Cir. 1969).

In the case of *Dunn* v. *Tyler Independent School District*, 327 F.Supp. 528 (E.D. Tex. 1971) certain black students staged a walk-out from the defendant school and thereafter were excluded from school until the students and their parents submitted to individual sessions between the student, his parents and a school official. Some of the students submitted to the individual interviews, which interviews amounted to interrogation by the school official as to the part played in the walk-out by the particular student. After the interviews the students were suspended on the basis of the information which they had given to the school official. Other students refused to submit to the

interviews and were excluded from returning to classes. Students in both categories were included as plaintiffs in the suit. The school authorities were acting under a regulation which provided in pertinent part as follows (page 533):

> Any student who participates in a boycott, sit-in, stand-in, walk-out or other related forms of distraction . . . shall by this action be subject to automatic suspension from school.

The Court held this regulation to be in violation of the Constitution in the following language:

> (5) The regulation in issue here fails in this particular, since it arbitrarily prohibits all boycotts, sit-ins, stand-ins, walk-outs without limiting its proscription to such activities involving misconduct or those which present a material and substantial disruption of the educational environment.

If the rule in *Dunn* v. *Tyler* was void then this one in this case is doubly so.

It is obvious from a reading of the regulation involved in this case (A. 102, Exhibit #A) that it is void on its face as requiring automatic suspension without regard to any mitigating circumstances of any type. Further, it is obvious from a reading of the Minutes of the School Board of its meeting of February 18, 1972 (A. 105, 196), that the School Board so considered its rule as being automatic and mandatory and requiring no action from the Board at all.

Under those circumstances there can be little doubt that the rule is invalid on its face, that the procedure by which it was enforced is invalid and that both the District Court and the Court of Appeals should have so held.

There are other cases holding that education is an interest protected by the due process clause.

Meyer v. *Nebraska*, 262 U.S. 390, 43 S.Ct. 625 (1923);
Bolling v. *Sharpe*, 347 U.S. 497, 499, 74 S.Ct. 693, 694 (1954).

School Record

The rule involved in this case specifically provides:

> . . . suspension will be noted on the permanent record of the student along with reason for suspension.

In other words, a public record is made of the fact of the suspension and the reason for it just about the same as for a convicted criminal. Perhaps public school records are not public records in the sense of the deed records down at the courthouse, but it is traditional for prospective employers to request school transcripts and for institutions of higher learning, prior to admission of a student, to request certified copies of school transcripts. Likewise, the same can be subpoenaed and introduced in court when pertinent.

If a public record in this sense is going to be made and maintained by this school board of its suspensions and the reasons therefor, can the school board be heard to argue that the person suffering such suspension and the making of such record is not entitled to due process nor the protection of the Federal Constitution in the Federal Courts.

This type of a record is not only embarrassing and stigmatizing but can become a serious obstacle to obtaining needed employment or to being able to pursue further education. Further, it is in reality a form of defamation of reputation. To subject a person to this type of punishment certainly is required to conform to the requirements of due

process of law. *Wisconsin* v. *Constantineau*, 400 U.S. 433, 437, 91 S.Ct. 507, 510 (1971).

Included in the relief requested in this case by the Plaintiffs is an injunction against the making of such a record. See paragraphs numbered 16 and 3, both on Appendix page 11. The prayer against sanctions included barring the Defendants from making, maintaining or furnishing copies of such a record.

Reply to Questions Presented by Board Brief

The Plaintiffs do not consider the question numbered 1 and set out on page 2 of the Board's Brief as being involved in this case at all.

Several circumstances described in the question do not exist in this case at all. (1) Invalidation was not on the grounds of insufficiency of the evidence. It was on the basis of not requiring any proof at all. (2) There was no "possession or use of intoxicating beverages etc. . ." (3) The students do present claims of deprivation of fundamental constitutional rights. (4) The procedures utilized were held to violate due process requirements by the Court of Appeals, thus presumably that amounts to a ruling that they were unlawful. Therefore, it is the position of the Respondents that the question as phrased by the Petitioners is not involved in any way in this case.

Reply to Argument 2, Page 30, Petitioners' Brief

The effort of the Board under this Section is to charge the Court of Appeals with having added the School Board as the Court of initial jurisdiction and then having reviewed the action of the School Board as though it were the first Court in the jurisdictional chain. On this premise the Board rests its entire argument against the finding by

the Court of Appeals that substantive due process had been denied the Plaintiffs in this case. The Board relies heavily upon the dissent filed by Judge Mehaffy.

Judge Mehaffy, in his dissent, repeatedly attempted to characterize this case as one in which the Circuit Court of Appeals was passing on the sufficiency of the evidence before the school board and requiring the United States District Court to do the same thing. That view is entirely incorrect and misconceives the whole problem.

The problem was not with the evidence. The problem was with the procedure. There could be no problem with the evidence because there was no evidence. There was no hearing worthy of the name. There was no openminded consideration of anything except the hearsay version by Mrs. Powell and Mr. Waller of what the girls had said plus the hearsay upon hearsay reported by Superintendent Inlow on the telephone call he took on the night of the "secret meeting".

The simple truth is that the Board made a very serious mistake. Plaintiffs submit that the Board later realized what a serious mistake they had made and how bad it made them look; however, that rather than thereafter being big enough to admit that they had made a serious mistake, they have undertaken ever since to maintain that same stand in the hope that they will ultimately be approved in it and, thus, vindicated, perhaps, in their own estimation, but more importantly to them, in the eyes of the school patrons. From the time of the February 18, 1972, meeting the School Board has been preoccupied with its own image to the public and not with the interest of these Plaintiffs.

On the night of the "secret meeting" the School Board Members lost sight of the fact that the public schools are

created, financed and maintained, for the benefit of the school age children, and owe their very existence to the fact that there are school aged children. The schools do not exist for the benefit of the School Board directors nor the administrative staff nor the teachers. They exist only for the benefit of children. In this case, even if the children had been guilty of the terrible acts which the School Board apparently imagined, nevertheless, the interest of the School Board should have been directed toward rehabilitating the children and getting them back into the educational environment. Since the February 18, 1972, meeting the School Board has demonstrated a complete void of any such inclination.

Damages

This case was not filed as a damage suit. The original complaint, filed March 6, 1972, contained no prayer for damages, either compensatory or punitive (Appendix 6-12). The Motion for Preliminary Injunction filed with the Complaint, even though it did allege "irreparable injury, loss and damages to the plaintiffs," contained no prayer for damages (Appendix 12). At the time of the hearing of March 7, 1972, there was pending before the District Court no claim or prayer for judgment for money damages.

Although the District Court denied the prayer for temporary relief, the District Court did take jurisdiction for the purpose of considering whether or not the school board had proceeded in a constitutional manner.

> "You can have a constitutional rule and then if it is unconstitutionally applied or mistakenly applied it could do just as much harm to a pupil as if you had intentionally done something." (Appendix 80).

Therefore, jurisdiction was taken on the allegations of deprivation of constitutional rights and not on the basis of any claim for damages.

At that first hearing the District Judge had a great deal to say to the School Board about the manner in which they had proceeded, the severity of the judgment which they had pronounced, and the inconsequential nature of the alleged offense of the girls, the potential effectiveness of a more common sense approach of treating the incident as one of minor consequence and permitting the little girls to return to school.

The rather long lecture which the court gave to the Board at the end of the hearing, appendix 78 through 84, was so obviously an effort by the Judge to talk reason and common sense to the Board and to show them that they should open their minds to reason and work out a prompt way of getting the children back in school (Appendix 78 through 84).

Notwithstanding this counsel by the District Judge, three days later the defendants filed their joint answer taking the hard line, demanding strict proof of all allegations from the plaintiffs and praying that the complaint be dismissed.

It was four days later that the Motion to Amend the complaint was filed (Appendix 91-92) wherein the plaintiffs alleged damages inflicted upon them by the defendants in depriving them of their right to attend school, by forcing them to pursue some substitute means of education at their expense and inconvenience, and inflicting upon the plaintiffs humiliation and embarrassment by reason of the stigma attached to the expulsion, the making of a record of the unlawful punishment which would continue as a continuing source of harassment, intimidation,

abuse and embarrassment for the plaintiffs, and forcing the plaintiffs to engage in protracted and expensive litigation to protect their rights. Those allegations appeared in the paragraph numbered 1 of the amendment (Appendix 91) and in a separate paragraph, numbered 3 (Appendix 92), the plaintiffs alleged malice and wanton disregard of the rights of the plaintiffs.

On the basis of the allegations in the paragraph numbered 1 the plaintiffs prayed for compensatory damages. On the basis of the allegations contained in the third paragraph, the plaintiffs contended for punitive damages.

It was only after the District Court had denied the application of the plaintiffs for a temporary injunction restoring them to school attendance, and after the school board demonstrated its lack of response to the admonitions of the District Court by filing its answer, that the plaintiffs realized that they were not going to get back into school in time to pass the year's work. The Plaintiffs realized they would be involved in protracted litigation to establish their constitutional rights. They then concluded to and did move to add a count for compensatory damages and a count for punitive damages.

It has proved to be a tactical mistake for the plaintiffs.

In the first place, it permitted the school board to characterize the case as one only for damages. It permitted the School Board to characterize the children and their parents as being interested only in what they could get out of the case in money.

Secondly, it permitted the District Court to send the case to the jury on instructions which treated it as though it were a suit only for money damages.

Thirdly, it has now served as a bone of contention on an appeal to this Court.

When the plaintiffs filed their motion to amend the complaint to add the counts for damages, which filing was on March 14, 1972, the District Court took the filing of this motion as a development presenting another opportunity for the Court to counsel with the Board. Thus, the hearing of April 7, 1972, was on the motion of the plaintiffs to add the counts for damages. Again, the District Judge practically pleaded with the Board to go back to Mena and hold another meeting and let the children come before the Board and apologize and let the children return to school, as the Board had just done in a matter involving four boys that occurred after this suit was filed (Appendix 86 through 89). The report by Mr. Hardegree of April 12, 1972 (Appendix 90), was in response to the specific request of the Court. This report demonstrates that two of the Board members, Forest Ogden and J. M. Ayleshire, had heard the message of Judge Williams. However, the Board president, Mr. Stevenson, and three other members, Mrs. Rachael Goforth, Mr. Raymond Stroud and Mr. Bob Philpot, remained adamant. They had suspended the boys only two weeks for drinking beer but they refused to reinstate these girls after they had been out seven weeks. It was only after that report that the motion to amend the complaint was permitted.

The petitioners are not interested in persuading this Court nor any other Court to abolish the qualified immunity of public officials. No better brief on this subject could be written than the opinion of this Court in *Scheuer* v. *Rhodes*, ... U.S. ....., 40 L.Ed.2d 90 (1974). That opinion stands as the last word on the subject from this court and in that opinion, which did not involve members

of public school boards, the court set out the rule as follows:

> "These considerations suggest that, in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good faith belief, that affords basis for qualified immunity of executive officers for acts performed in the course of official conduct."

The Board does not dispute the fact that 42 U.S.C., Section 1983 (Board brief page 3) authorizes a suit for damages, among other remedies. The general order of the United States District Court for the Western District of Missouri, reported in 45 F.R.D. 133, and referred to hereinabove, specifically includes, in its subdivision entitled "Nature of Action", that "The action may be (a) Under Section 1983, an action at law for damages triable by a jury."

Numerous Federal Court decisions have permitted recovery of damages, both compensatory and punitive, under Section 1983. Examples are: *Brickhouse* v. *Brooks*, 165 Fed. 534 (Cir. Ct., E.D. Va. 1908); *Sexton* v. *Gibbs*, 327 F.Supp. 134 (N.D. Texas 1970); *Washington* v. *Official Court Stenographer*, 251 F.Supp. 945 (D.C. E. Pa. 1966); *Basista* v. *Weir*, 340 F.2d 74 (3rd Cir. 1965); *Caperci* v. *Huntoon*, 394 F.2d 799 (1st Cir.), Cert. denied, 393 U.S. 940, 89 S.Ct. 299, 21 L.Ed.2d 276 (1968).

The effort by the Board to escape from damages is bottomed entirely upon a claimed immunity from civil suit damages for public officials and specifically school board directors. The petitioners contend first for an absolute immunity and in the alternative for a qualified immunity at least sufficiently broad to preclude damages in this case. They contend for the "malicious act done with intent to cause harm" test applied by the District Court in this case. *Strickland* v. *Inlow*, 348 F.Supp. 244, 250 (W.D. Ark. 1972).

The Board criticizes the decision of the Court of Appeals, which overturned the District Court's "malicious act with intent to harm" test with one of "objective good faith". Authority relied upon by the Court of Appeals for that test is *McLaughlin* v. *Tilendis*, 398 F.2d 287 (7th Cir. 1968); *Gouge* v. *Joint School District No. 1*, 310 F.Supp. 984 (W.D. Wis. 1970); Wash. U. L. Qtly. 666 (1971); Weddle, Damages Under § 1983: The School Context, 46 Ind. L.J. 521 (1970-71.)

Support for that view is also available in: *Gautreaux* v. *The Chicago Housing Authority*, 296 F.Supp. 907 (N.D. Ill. 1969); *Bennett* v. *Gravelle*, 323 F.Supp. 203 (D. Md. 1971).

As the Board brief has pointed out, the Court of Appeals in this case has held that the test of good faith is objective, rather than subjective. We take this to mean that the claim of good faith on the part of the involved official is not alone sufficient to obtain for him a concession of good faith. His actions which are challenged must be reasonably consistent with the existence of good faith. In other words, the ancient observation that "actions speak louder than words" is singularly appropriate here. His good faith must be determined by his actions, not by his claim of good faith only.

It is, therefore, appropriate in this case that the jury have an opportunity to pass upon the good faith of these defendants under proper instructions. The instructions which were given to the jury afforded the plaintiffs no relief whatever, either injunctive, declaratory relief or damages, unless malice and a deliberate intent to injure was proved by the plaintiffs.

In this case the good faith of the defendants should be tested by a consideration of the fact that the meeting of February 18, 1972, was called to be held late in the evening, that no notice was given to the parents, that no information of any kind was given to nor required by the school board other than the recital to the Board of the information which Mrs. Powell and Mr. Waller had obtained from the three frightened little girls who were, in effect, begging for mercy, that no investigation whatever was made by the Board, that the Board requested no information as to what kind of students the girls had been, whether they had ever been involved in any other disciplinary matter, whether in fact they had succeeded in spiking the punch, what type of drink they had used, whether anyone had been intoxicated or even offended by the effort. The Board made its snap judgment without the benefit of any reliable information at all. Further, it permitted its automatic rule to become operative without ever even seeing the children involved, much less talking with them.

It is clear from a reading of the testimony that this Board apparently was almost hysterically afraid of drugs and alcohol (Appendix 69, 105 and 106). The Board apparently conceived itself to be passing sentence upon "alcoholic beverages" rather than upon children. The Board appears insensible to the tragic fact that three children were being victimized.

The "good faith" or lack of it must be measured against the events of the meeting of February 18, 1972. That meeting was moving right along toward leniency for all three of the girls until the telephone call by Mr. Curtis Powell came into the Board room and was received by Superintendent Inlow. Mr. Curtis Powell had not observed the incidents which he related (Appendix 64). Mr. Powell did tell Mr. Inlow that, according to his information, only one of the three girls was involved, and that was Jo Wahl. He did not mention either Virginia Crain or Peggy Strickland (Appendix 65).

Notwithstanding that Mr. Inlow had this information when he made his report to the School Board he withheld the information that only Jo Wahl was involved. He then sat there and observed the turnaround of the two teachers and the entire school board and never volunteered the information which he had that only Jo Wahl had been involved in that altercation, according to hearsay upon hearsay.

If lack of good faith is required, then one would be hard put to find any more striking example. The same is true of the actions of Mr. Duddy Waller and Mrs. Powell who, upon hearing the report by Mr. Inlow, vocally expressed themselves to the Board as withdrawing their recommendations as to all three girls and Mrs. Powell said, "I just washed my hands of it." Mr. Waller said "I withdraw my recommendation." (Appendix 65).

By the time the information reached the school board it was third hand; hearsay upon hearsay. Mr. Inlow had, in his report, said that one of the three girls was involved. Even though he did not say which one, he did say that one of them, not all three of them, had been involved, according to the report. Mr. Waller and Mrs. Powell did not

ask which one. They did not limit their turnabout to just one. Again, this is either bad faith or fear. These two teachers may have been so intimidated and afraid of the school board that for them to have been involved in making a recommendation for a girl who was reported to have misbehaved even while they were making the report, they might have imagined that the reaction of the school board would be against them directly. The emphatic quality of their turnabout may have been influenced by that fear. If not, it certainly was bad faith.

The minutes of the meeting of February 18, 1972, appendix 105, shows that six members of the school board were present for that meeting. Not one of those six members had enough compassion or concern for the three children to slow everyone down and ask Mr. Inlow which one of the girls was reported to have been involved. Not one of those six people suggested that perhaps the meeting could be postponed until the children and their parents could be present for a further explanation. Not one of those six members asked if anyone knew for a fact just what had been put into the punch. Not one of those six members suggested that perhaps some of the mothers of the girls who had attended the FHA meeting and drank of the punch could be asked what they knew about it and what they thought about the incident. Not one of those Board members suggested that the homeroom teachers of these girls could be asked to offer their suggestions about what would be appropriate punishment. Not one of the school board members suggested that the rule was not automatic for expulsion. Not one of the school board members suggested that mitigating circumstances could be considered.

Under the circumstances of the meeting, and considering the manner in which it was conducted and the con-

clusion that it resulted in, it was obviously called too hastily, conducted too summarily, coldly, impersonally, superficially, ineptly and brutally. If it were not bad faith, it was certainly an adequate substitute.

When these circumstances commenced to be brought to light, there were two possible courses of action for the school board. It could have compassionately and graciously admitted the hastiness of its action, agreed to an appropriate reconsideration, met again at a convenient hour and after adequate notice to all parties concerned, and taken the matter up in a reasonable, open-minded, humane, capable and effective manner.

Or, it could have closed its mind, declared its righteousness, refused all reconsideration, denied all pleas for leniency and maintained a hard line and an unyielding stand.

It took the latter course.

Every effort by the children and their parents to obtain a fair consideration met with stone-faced silence. Every effort by the District Court to reason with the Board fell on deaf ears.

If the foregoing course of conduct, as is so amply demonstrated by this record, is good faith then good faith occupies the entire panorama. There is no room left for bad faith.

CONCLUSION

The trial court very clearly was of the opinion, following the March 7, 1972, hearing, that the defendants had failed to proceed in a constitutional manner and had failed to afford due process of law to these plaintiffs. At that

point the trial judge should have granted the temporary injunction which would have restored the children to their classes, and then, with the children back in school, the court should have ordered the board to go back through the entire procedure and to do it in a constitutional manner. Instead, the court leaned over backwards to keep from ordering the school board to do what the court clearly thought they should do.

> Appendix 88: "I think the School Board ought to be big enough to face up to it and not make me have to make an order about running the schools. . . ."

Instead of ordering the school board to readmit the children pending a constitutional hearing, the trial court attempted to persuade the school board to be reasonable and to readmit the children voluntarily. The trial judge underestimated the stubbornness of the Board. While the trial judge was remonstrating with the Board members, time was passing and the opportunity to reinstate these children passed on by. Consequently, they were kept out of school for the balance of the semester and failed the year.

It can be argued forcefully that the children actually lost this case when they failed to get the temporary injunction. However, there remains the fact of the record required to be made against them by this rule, which rule states that "such suspension will be noted on the *permanent* record of the student along with reason for suspension (emphasis supplied)." The plaintiffs are entitled to an order requiring the school board to destroy that record and prohibiting them from remaking it or maintaining it in the future and from ever furnishing such a record to any interested inquirer. The court of appeals so ruled.

Further, the plaintiffs are entitled to a judicial determination of the rights of children in their circumstances

to the rudiments of due process and an adjudication that they are protected to that extent by the United States Constitution against summary expulsion without notice, without information as to what has been said before the board about them, without an opportunity to be heard and an opportunity to prepare for that hearing. It was for this relief that the plaintiffs requested a declaratory judgment.

Further, the plaintiffs could obtain and should have a decree of this court holding the Mena rule, in its present form, as invalid by reason of being discriminatory and unequal in its application to persons subject to it.

Further, the plaintiffs, having been awarded an attorney's fee in the court of appeals, the same should be approved and an additional fee allowed for their expenses in this court.

The Board argues that to permit suits of this nature against school board members will discourage qualified people from accepting positions on school boards. Perhaps it would be facetious to say that persons who discharge their duties on school boards in the same manner as it has been done in this case should be discouraged from accepting such positions. Realistically, however, respondents admit the validity of arguments that public officials should not be unnecessarily harassed by vexatious law suits. However, law suits to establish, protect and defend constitutional rights are not properly characterized as vexatious law suits. On the contrary, they are probably the most important type of litigation with which the courts deal. They involve the very fundamentals on which this country was founded; that is, the liberty of the individual.

If this particular school board had been properly cognizant of the fact that it was dealing with citizens of the

United States, and proceeded accordingly, respecting the rights of those citizens, this law suit never would have been filed. The unfortunate circumstance that gave rise to this law suit is that these children were not treated as citizens of the United States. On the contrary, the Board proceeded on the tradition prevailing in Arkansas many years ago that the adult school board members and adult school administrators were the repository of all wisdom and were infallible in their judgments and absolutely qualified to decide what was best for school children, including what sort of information they would consider sufficient for action, and what action would be taken. In the paternalistic attitude of the past, which was mentioned by Judge Williams in his statements to the Board (Appendix 80), the school boards and school administrators summarily punished children, including suspending and expelling them, without any thought of giving them any due process of law at all, and did it in good faith.

In the days of the one room school, the schoolmaster was witness, judge, jury and executioner, but he knew his pupils intimately and was with them constantly. In today's large schools disciplinary procedures must be more formal to assure that discipline accomplishes justice rather than injustice.

If school boards and administrators are given immunity so that they can, with impunity, violate the constitutional rights of the children attending public school so long as they do it in good faith, then a premium is placed on ignorance and stupidity and the constitutional rights of the students are abrogated. We will have the anomaly of the availability of constitutional redress for the children depending upon the degree of ignorance enjoyed by the particular school administrators and school boards of their particular district.

The plaintiffs respectfully submit that the ruling of the Court of Appeals was correct insofar as it granted the relief prayed for by plaintiffs and should be affirmed and that the case should be sent back to the District Court for the entry of an order consistent with the decision of the Court of Appeals and for a jury trial on the issue of damages.

Respondents respectfully pray that an additional attorney's fee be allowed in this court and that they have judgment for all of their costs.

Respectfully submitted,

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